Supreme Court, U.S.
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No. 95-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

WALTER R. LEGER
D/B/A OFFICE CHAIR MAINTENANCE CO.,
Petitioner,

v.

MICHAEL ADAMS, AS HE IS
COMMISSIONER OF REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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55 pp

Question Presented

Whether the Massachusetts Commissioner of Revenue violated the Fourteenth Amendment's Due Process Clause when he placed a lien upon a taxpayer's residence to secure collection of an unpaid tax *after* he had provided the taxpayer with both notice and an administrative hearing regarding the validity of the tax?

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Pursuant to Supreme Court Rule 15, the respondent Commissioner of Revenue ("Commissioner") submits this Brief in opposition to the Petition For Writ Of Certiorari ("Pet.") of the petitioner-taxpayer Walter R. Leger ("taxpayer").

Decisions Below

The taxpayer omits from his recitation of decisions below the unreported decision of the Commissioner's Appeal and Review Bureau ("Appeal Bureau") upholding the validity of the underlying tax, which the Appeal Bureau rendered prior to the attachment of the contested lien on the taxpayer's residence, and which was in the record below. The Commissioner reproduces the Appeal Bureau's decision at pp. A-3 through A-12 of the Appendix to the Brief In Opposition ("Opp. App.").

Jurisdiction

The Court does not have jurisdiction over the post-deprivation process claim asserted in Section IIB of the Petition's Argument (Pet. pp. 21-22), as the issue was neither actually decided by the Supreme Judicial Court nor properly raised by the taxpayer below. The Commissioner does not contest the Court's jurisdiction over the pre-deprivation process claim asserted in Section IIA of the Petition's Argument (Pet. pp. 13-20) other than to note that jurisdiction lies under 28 U.S.C. § 1257, rather than 28 U.S.C. § 1254(1) as asserted at p. 2 of the Petition.

Relevant Statutes

The taxpayer omits from his recitation of pertinent statutes both M.G.L. c. 62C, §§ 26(a) and 26(b) (1st para.), which address the process that a taxpayer receives before the Commissioner makes a deficiency assessment and attaches a lien, and 50(b), which specifies that a lien does not become effective against third parties until the Commissioner has recorded it. Due to their length, the Commissioner reproduces these statutes at pp. A-1 and A-2 of the Opp. App. pursuant to Supreme Court Rule 14.1(f).

Statement of the Case

An accurate statement of the case appears in the opinion of the Supreme Judicial Court of Massachusetts at pp. 1a-4a of the Appendix To Petition For Writ Of Certiorari ("Pet. App."). Several aspects of the Supreme Judicial Court's recitation merit emphasis and/or elaboration.

1. Notwithstanding the repeated allusions in the Petition that this case involves the "seizure" of a taxpayer's home, *see* Pet. pp. i, 4, 8-9, 12-13, 15, the only collection device that the Commissioner has utilized here is the attachment and filing of a lien on the taxpayer's residence. Pet. App. pp. 2a-4a. Under Massachusetts law, the lien creates a security interest in the affected property for the amount of the unpaid tax. *See, e.g., Hurley v. Boston Railroad Holding Co.*, 315 Mass. 591, 608, 54 N.E.2d 183, 193 (1944). Separate sections of M.G.L.

c. 62C provide the Department with the right to levy upon — *i.e.*, to distrain or seize — a taxpayer's property. M.G.L. c. 62C, §§ 53, 56. The levy procedures have never been at issue in this case.

2. As noted above, the taxpayer in fact received both written notice and an Appeal Bureau hearing *before* the Commissioner assessed the tax deficiency and imposed the corresponding lien. Pet. App. pp. 3a-4a. At that hearing, the taxpayer had the right to representation, the right to present both evidence and legal argument either orally or with documents, the right to bring witnesses, and the right to question Department of Revenue officials who were present. Opp. App. pp. A-26 through A-28. The taxpayer also had the right to a written decision, *id.*, and he in fact received a lengthy ruling that addressed his substantive tax claims in depth, *id.* pp. A-3 through A-13.

3. The Petition, however, argues that a "court" hearing must precede the imposition of a lien, Pet. p. 16, as the taxpayer asserted before the Supreme Judicial Court. Pet. App. pp. 1a-2a, 5a. If accepted, the plaintiff's argument would increase dramatically — indeed by up to 70,000 cases annually — the caseload of an already overburdened Massachusetts Superior Court. Opp. App. p. A-29. Given the sheer number of liens involved, it defies reality for the Petition to assert that "[t]he fiscal and administrative burdens . . . [are] de minimis" because "[t]he court system has already been set up." Pet. p. 16.

4. The taxpayer asserts as an alternative claim that "[e]ven if it is assumed that a prompt post-deprivation notice and hearing is all that procedural due process requires," he did not receive a post-deprivation hearing "at a meaningful time." Pet.

pp. 21-22. However, he did not raise this claim in the proceedings below. Contrary to the assertion at Pet. p. 8, neither count in the taxpayer's Superior Court complaint makes any reference to post-deprivation procedures. Opp. App. pp. A-19 through A-21. The Superior Court accordingly did not adjudicate any such separate claim in its Memorandum Of Decision And Order. Pet. App. pp. 17a-20a. While the Supreme Judicial Court did reference this issue in its opinion, it expressly declined to reach the question, explaining *inter alia* that the matter was not "ripe for judicial review" and that the "factual record [was] not adequate enough to address [a] constitutional claim." Pet. App. p. 8a.[1]

Reasons for Denying the Writ

"A review on writ of certiorari is not a matter of right but of judicial discretion," which is to be invoked "only when there are special and important reasons therefor." Supreme Court Rule 10.1. No such special circumstances exist for reviewing the Supreme Judicial Court's decision here, where the taxpayer points to no conflict with the decisions of the

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[1] The taxpayer did point to a delay in post-lien proceedings before the Massachusetts Appellate Tax Board in his Superior Court summary judgment memorandum and his Supreme Judicial Court brief. However, he did so only as alleged further support for his claim that the Commissioner must hold a *pre*-deprivation hearing, rather than as a separate claim that he did not receive a sufficiently prompt post-deprivation hearing. The Commissioner accordingly did not brief such a separate claim below.

Circuit Courts of Appeal or the highest courts of other states, and where the decision indeed directly applies the settled law of this Court regarding predeprivation process. In this regard, the Court has ruled twice with the past fourteen months that in the revenue collection context, "[d]ue process . . . allows the State to maintain an exclusively postdeprivation regime." *Reich v. Collins*, 115 S.Ct. 547, 550 (1994); *accord National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. 2351, 2354 (1995). For this reason and the fact that the Court lacks jurisdiction over the taxpayer's alternative post-deprivation process claim for lack of presentation and decision below, the Court should deny the Petition.

I. THE SUPREME JUDICIAL COURT'S REJECTION OF THE PRE-DEPRIVATION HEARING CLAIM IS CONSISTENT WITH THE REPEATED DECISIONS OF THIS COURT.

Supreme Court Rule 10.1(c) states that the Court may consider certiorari review when a state court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." These factors are manifestly absent here, where the Supreme Judicial Court's rejection of the taxpayer's pre-deprivation process claim follows directly from this Court's longstanding doctrine.

A. *As Reiterated by the Court Twice Last Term, A State Has No Due Process Obligation to Provide a Taxpayer with Any Predeprivation Hearing At All in the Tax Collection Context.*

"[I]t is well established that a State need not provide predeprivation process for the exaction of taxes." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 37 (1990). The Court has explained:

> Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we have long held that a State may employ various financial sanctions and summary remedies such as distress sales in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

Id.

Consistent with this principle, the Court has expressly distinguished summary tax collection procedures from private litigation prejudgment security devices such as replevin or attachment, where the Court frequently has required a predeprivation hearing. *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972)(revenue collection recognized as "extraordinary situation

[that] justif[ies] postponing . . . opportunity for a hearing"); *see also Connecticut v. Doehr*, 111 S.Ct. 2105, 2112 (1991)(emphasizing reduced nature of governmental interest in prejudgment security provisions for private litigation). This distinction follows naturally from the third element of the familiar three-part procedural due process standard, *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), which inquires into "the Government's interest, including . . . the fiscal . . . burdens that the additional . . . procedural requirement would entail."[2]

The corollary of this doctrine is that a state that does not provide taxpayers with a predeprivation hearing must afford them postdeprivation procedures that contain a "clear and certain remedy." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. at 38-39. The required postdeprivation process is by no means unlimited; *McKesson* specifies that "States may avail themselves of a variety of procedural protections . . . , such as . . . enforcing relatively short statutes of limitation . . . ." *Id.* at 50. Massachusetts provides its citizens with more than ample postdeprivation relief, as any taxpayer may seek an abatement from the

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[2] The Court has thus found the governmental interest in predictable revenue collection to be "exceedingly strong" and the governmental interest in prejudgment security provisions for private litigation to be lower. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 37; *Connecticut v. Doehr*, 111 S.Ct. at 2112. As a result, a case-specific *Mathews* inquiry does not apply in the tax collection area, where there is instead a "long held" *per se* rule that "a State may employ . . . summary remedies." *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. at 37.

Department within one year after paying a challenged tax, M.G.L. c. 62C, § 37, may appeal a denial of that abatement to the Appellate Tax Board, M.G.L. c. 62C, § 39, may appeal an adverse Board ruling to the Massachusetts Appeals Court, M.G.L. c. 58A, § 13, and, if successful at any of these levels, will receive a full refund of any tax paid with interest, M.G.L. c. 62C, § 40. These postdeprivation procedures easily satisfy Fourteenth Amendment standards as articulated in *McKesson*.

The taxpayer studiously avoids *McKesson* in his Petition. He instead relies heavily upon his interpretation of *dicta* in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), asserting that *Good* is the Court's "most recent case that upholds the Petitioner's position . . . in the tax collection area." Pet. p. 17.

In reality, *Good* is not the Court's last word on the subject, as the Supreme Judicial Court noted. Pet. App. p. 5a. Fourteen months ago, the Court issued *Reich v. Collins*, 115 S.Ct. 547 (1994). That decision specifies:

> [U]nder *McKesson*, [a State] has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." *Due process*, we should add, *also allows the State to maintain an exclusively postdeprivation regime*, or a hybrid regime. A State is free as well to reconfigure its remedial scheme over time, to fit its changing needs. *Such choices are generally a matter only of state law.*

Reich v. Collins, 115 S.Ct. at 550 (emphasis supplied). *Reich* also expressly recognizes that "for obvious reasons, States

ordinarily *prefer* that taxpayers pursue only postdeprivation remedies, *i.e.*, that taxpayers 'pay first, litigate later.'" *Id.* at 551 (emphasis in original).

The Court again reaffirmed *McKesson* later in its October, 1994 Term. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. 2531, 2354 (June 19, 1995). The Court stated in *National Private Truck Council*:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. . . .
>
> The reluctance to interfere with state tax collection continued in *McKesson* . . . , in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation. As long as state law provides a "clear and certain remedy," . . . the states may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford post-deprivation relief (e.g., a refund) . . . .

Id. (citations omitted).

The Court could not have been clearer that the traditional tax collection doctrine permitting exclusively postdeprivation hearings remains the law of the land. Its decisions also could hardly be more recent. Given *Reich* and *National Private Truck Council*, the taxpayer's attempt to argue that *Good* establishes an entirely new due process jurisprudence for tax

collection is wholly without basis.[3]

Moreover, *Good* would not advance the taxpayers' Fourteenth Amendment position even if it were the Court's most recent decision to discuss the issue. A 123-26. *Good* addresses a federal drug forfeiture statute serving law enforcement purposes — purposes that are quite distinct from the collection of a tax, upon which the very operations of a sovereign government depend. *See id.* at 449. Furthermore, *Good*'s facts vary sharply from those in the present case, as it involves the summary seizure of real property, rather than the simple attachment of a lien. *Id.* In this markedly different context, the Court held that "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." *Id.* at 505.

Good accordingly does not alter the analysis here. While the Court referenced prior decisions "permitt[ing] the ex parte seizure of real property when the Government was collecting debts or revenue," it specified that it reached its forfeiture holding "without revisiting these cases." *United States v.*

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[3] These decisions also dispose of the taxpayer's argument that the United States Internal Revenue Service ordinarily will not impose a lien until after the opportunity for a hearing. Pet. p. 20. The point is not that the Commissioner could provide a hearing prior to the imposition of its lien — he in fact already does, as summarized at pp. 13-16 *infra*. The teaching of *National Private Truck Council*, *Reich*, and *McKesson* is instead that the Fourteenth Amendment does not *require* the Commissioner to provide such a hearing. What the Internal Revenue Service does or does not do is thus entirely irrelevant.

James Daniel Good Real Property, 114 S.Ct. at 504.[4] The Court indeed expressly distinguished the tax cases by specifying that in the case before it "the Government . . . could not justify the prehearing seizure of forfeitable real property as necessary for the protection of its revenues." *Id.* at 505. As the Superior Court concluded below, quite presciently in light of *National Private Truck Council* and *Reich*, "[t]he dicta in *Good* simply cannot be fairly construed as impliedly reversing a rule of law which the Supreme Court itself affirmed as recently as 1990." Pet. App. p. 20a.[5] The Supreme Judicial Court's decision is thus entirely consistent with this Court's rulings regarding pre-deprivation process in the tax collection area.

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[4] The Court's recent reaffirmances of *McKesson* have since made it clear that even summary seizure remains entirely permissible in the tax context. *National Private Truck Council v. Oklahoma Tax Commission*, 115 S.Ct. at 2354; *Reich v. Collins*, 115 S.Ct. at 550; *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. at 37. As previously indicated, the Commissioner's levy powers are not at issue in this case.

[5] *Good* explicitly endorsed the summary imposition of a lis pendens in the forfeiture context. *United States v. James Daniel Good Real Property*, 114 S.Ct at 504. Given the practical similarities under Massachusetts law between a lis pendens and a lien, *see, e.g.*, *Debral Realty, Inc. v. DiChiara*, 383 Mass. 559, 565, 420 N.E.2d 343, 348 (1981) (economic effects of a lis pendens "mirror" those of an attachment), *Good* actually *supports* the Commissioner's position regarding the tax lien.

B. *The Commissioner Already Provided the Taxpayer with an Administrative Hearing Before the Lien Attached, Thereby Satisfying Due Process Standards Even If a Prior Hearing Were Required.*

The taxpayer's due process claim suffers from a further fatal deficiency under the Court's case law. Prior to the imposition of the Commonwealth's tax lien, the Commissioner in fact provided the taxpayer with an administrative hearing before the Appeal Bureau. Pet. App. pp. 3a-4a. As recited at pp. 44 *supra*, the procedures that he enjoyed at that hearing included the right to representation, the right to present evidence and argument (both orally and in writing), the right to question any representative of the Commissioner present at the hearing, and a written decision. Opp. App. pp. A-26 through A-28. These procedures more than satisfy the flexible due process standard; they indeed would even suffice for termination of subsistence welfare benefits, where administrative due process requirements are at their highest. *See Goldberg v. Kelly*, 397 U.S. 254, 267-71 (1970).[6]

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[6] Subsequent to *Goldberg v. Kelly*, the Court made it clear that the procedures required by due process vary with the type of case and that the requisite level of process is at its highest when subsistence welfare benefits are at issue. *Mathews v. Eldredge*, 424 U.S. at 334, 340-42 (distinguishing *Goldberg* and holding that a predeprivation hearing is not required for the termination of disability benefits). The necessary process for a pre-lien hearing would accordingly be *less* than that set forth in *Goldberg* (if, again, one were to assume for the sake of argument that any process at all is due in the tax context). In any event, the taxpayer has made no specific challenge to the process

The Petition complains that the Appeal Bureau hearing was insufficient because it did not address "the issue of seizure," instead providing "review on the substantive tax issue only." Pet. pp. 6, 8; *see also id.* pp. 12, 15. Before the Supreme Judicial Court, the taxpayer elaborated that the adjudicator must "consider whether the lien on the specific property is appropriate in the particular case" (in addition to determining the validity of the tax) before permitting a lien. The taxpayer based his argument on the following passage in *Good*:

> The governmental interest we consider here is not some general interest in forfeiting property but the specific interest in seizing real property before the forfeiture hearing. The question in the civil forfeiture context is whether *ex parte* seizure is justified by a pressing need for prompt action.

United States v. James Daniel Good Real Property, 114 S.Ct. at 502.

This argument grossly misreads *Good*. As a review of the decision makes clear, the quoted passage concerns a factor used to determine whether a preforfeiture hearing is required — *i.e.*, whether a hearing has to be held at all.[7] It does *not* describe

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available before the Appeal Bureau other than the discrete points addressed *infra*.

[7] The passage thus appears in a paragraph where the *Good* Court addresses "the third consideration under *Mathews*, 'the Government's interest.'" *United States v. James Daniel Good Real Property*, 114 S.Ct. at 502 (applying tripartite standard of *Mathews v. Eldridge*, 424 U.S. at 319).

what has to be resolved *at* the hearing. Rather than the "specific property/particular case" inquiry prescribed by the taxpayer, all that is at issue in a preliminary forfeiture hearing is (1) whether there is probable cause to believe that the subject property was used for a narcotics offense and (2) whether any of the statutory defenses to forfeiture are available. *United States v. James Daniel Good Real Property*, 114 S.Ct. at 502.

Similarly, all that would be at issue in any pre-lien hearing would be a preliminary determination as to whether the assessed tax is validly due. Further inquiry would be inappropriate — by enacting the tax lien statute, the Massachusetts Legislature has already determined that a lien is an appropriate remedy for an unpaid tax. M.G.L. c. 62C, § 50. *Good* provides no basis whatsoever for impugning that legislative judgment.[8]

The taxpayer has also assailed the Appeal Bureau hearing for its alleged bias, complaining before the Supreme Judicial Court that the hearing officer was a "bureaucratic subordinate" of the Commissioner. However, simple employment by the Commissioner does not disqualify a hearing officer; it is instead well established that an agency may provide its own due process hearing. *See, e.g., Richardson v. Perales*, 402 U.S. 389, 410 (1971); *Marcello v. Bonds*, 349 U.S. 302, 311

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[8] While the Petition also complains that the taxpayer could not have raised any constitutional issues at the Bureau hearing, Pet. p. 6 n. 1, his substantive tax claim has no constitutional dimensions, involving instead only issues of statutory and regulatory construction. Opp. App. pp. A-19 through A-21. The argument is accordingly hypothetical and not properly before the Court.

(1955). *Goldberg v. Kelly* itself specifies that even "prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker." *Goldberg v. Kelly*, 397 U.S. at 271.[9] The Appeal Bureau procedure thus fully comports with longstanding due process standards, and the Supreme Judicial Court's decision would be consistent with this Court's prior opinions even if a pre-lien hearing were in fact required.

II. THE COURT LACKS JURISDICTION OVER THE POST-DEPRIVATION HEARING CLAIM, AS IT WAS NEITHER PROPERLY RAISED NOR ACTUALLY DECIDED BELOW.

As set forth in at pp. 4-5 *supra*, the Supreme Judicial Court did not resolve — and the taxpayer did not properly raise — his alternative claim that even if post-deprivation process were all that was required, he has not received that post-deprivation process "at a meaningful time." *See* Pet. App. p. 8a. The Court accordingly lacks jurisdiction over this claim under 28 U.S.C. § 1257, as "[i]n cases coming here from state courts there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state . . . ." *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). *See generally* Robert L.

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[9] *Goldberg* also cautions that the official "should not, however, have participated in making the determination under review." *Id.* This did not occur here, where the Commissioner's Audit Bureau made the initial determination to assess and the Appeal Bureau thereafter conducted the hearing. Pet. App. pp. 2a-3a.

Stern *et al.*, *Supreme Court Practice* § 3.17, at 122 (7th ed. 1993) (collecting authorities). No injustice will be worked by applying the jurisdictional rule here, where (1) the taxpayer has already enjoyed a pre-deprivation hearing on the substantive validity of the tax, *see* Section IB *supra*, and (2) the taxpayer would receive interest on any refund under M.G.L. c. 62C, § 40 if he were (a) to pay the tax to release the lien and then (b) ultimately to establish that the tax was invalid.

Conclusion

For the foregoing reasons, the Commissioner respectfully requests that the Court deny the Petition For Writ Of Certiorari.

By his attorneys,

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Date: February 14, 1996

APPENDIX TO BRIEF IN OPPOSITION

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M.G.L. c. 62C, §§ 26(a), 26(b) (1st paragraph)

Section 26. (a) Taxes shall be deemed to be assessed at the amount shown as the tax due upon any return filed under the provisions of this chapter and on any amendment, correction or supplement thereof, or at the amount properly due, whichever is less, and at the time when the return is filed or required to be filed, whichever occurs later.

(b) If the commissioner determines, from the verification of a return or otherwise, that the full amount of any tax has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was required to be filed, whichever occurs later, assess the same with interest as provided in section thirty-two to the date when the deficiency assessment is required to be paid, first giving notice of his intention to the person to be assessed. Such person or his representative may confer with the commissioner or his duly authorized representative as to the proposed assessment within thirty days after the date of such notification. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of tax remaining due the commonwealth, or any portion thereof, which he believes has not therefore [sic] been assessed.

M.G.L. c. 62C, § 50(b)

(b) The lien imposed by this section shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the commissioner:

(1) With respect to real property or fixtures, in the registry of deeds of the county where such property is situated, and

(2) With respect to personal property, in the office in which a security or financing statement or notice with respect to the property would be filed in order to perfect a mortgage or comparable nonpossessory security interest in tangible personal property belonging to the person named in the relevant notice. The filing of a notice of any such lien or of a waiver or release of any such lien shall be received and registered or recorded without payment of any fee.

April 24, 1992

Walter R. Leger, President
Office Chair Maintenance, Inc.
1146 Main Street
Fitchburg, MA 01420

Re: Walter R. Leger d/b/a Office Chair Maintenance Co. Notice of Intention to Assess Sales and Use Tax for the periods January 1, 1985 through September 30, 1985 and July 1, 1987 through September 30, 1989

Office Chair Maintenance, Inc. - Notice of Intention to Assess Sales and Use Tax for the Taxable Periods October 1, 1989 through March 31, 1990

Dear Mr. Leger:

A hearing relative to the above matter was conducted by this Bureau on April 19, 1991. The following issues have been presented for our determination:

1. Whether reupholstering constitutes the taxable sale of tangible personal property or, rather, a nontaxable service.

2. Whether the assessments for taxable periods other than the taxable period in issue and for future years should be barred from additional assessment.

For the reasons discussed below, we make the following determinations:

1. Reupholstering constitutes the taxable sale of tangible personal property.

2. All the periods in issue may be validly subjected to additional assessments.

BACKGROUND

Facts

Office Chair Maintenance Co. was founded by Walter R. Leger as a sole proprietorship in 1975. The business was incorporated as Office Chair Maintenance Inc. Sometime during October of 1987, (hereinafter Office Chair Maintenance Co. and Office Chair Maintenance, Inc. will sometimes be referred to collectively as "Taxpayers") [sic]. Office Chair Maintenance, Inc. used the original vendor registration number, issued to the sole proprietorship, Office Chair Maintenance Co., however, until October 1, 1990, at which time Mr. Leger obtained a new number in the name of Office Chair Maintenance, Inc.

For all periods in issue, Taxpayers' business was located in Fitchburg, Massachusetts. The primary activity of Taxpayers, during all relevant periods, was the reupholstering of office furniture. In typical transactions, customers provided Taxpayers with worn-out office furniture and Taxpayers returned the reupholstered furniture to their customers. Taxpayers has been separately stating the cost for materials used in the reupholstering, and collecting sales tax on that amount, but had not charged and collected sales tax with respect to separately stated charge [sic] for labor.

Procedural History

The New England Audit Bureau of the Massachusetts Department of Revenue ("the Audit Bureau") examined Taxpayers' books and records to determine compliance with General Laws Chapter 64H and 64I. As a result of this examination, the Audit Bureau determined that Taxpayers should have charged and collected sales tax on the labor charge and sent two Notices of Intention to Assess Sales and Use Tax — one to Walter R. Leger d/b/a Office Chair Maintenance Co., for the taxable periods January 1, 1985 - September 30, 1985, and one to Office Chair Maintenance Co., for the taxable periods October 1, 1989 - March 31, 1990. Both NIA's were dated September 19, 1990. By letter dated September 17, 1990, Taxpayers waived their rights to an office conference pursuant to General Laws chapter 62C, section 26b. Taxpayers subsequently requested a hearing at this Bureau and such request was granted.

DISCUSSION OF AUTHORITIES

1. *Sale of Tangible Personal Property*

General Laws Chapter 64H, section 1 defines a "sale" and "selling" to include in part:

> "the producing fabricating [sic], processing, printing or imprinting of tangible personal property for a consideration for consumers who furnished directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting".

General Laws Chapter 64H, section 1 defines "sales price" as "the total amount paid by a purchaser to a vendor as a consideration for a retail sale valued in money or otherwise. In determining the sales price the following shall apply: (a) no deduction shall be taken on account of labor or service cost."

General Laws Chapter 64H, section 1 defines a "retail sale" as "a sale of . . . tangible personal property . . . for any purpose other than resale in the regular course of business".

The Code of Massachusetts regulations defines "fabrication" at 830 CMR 64H.1.1:(3) as follows:

> Any change in the form or substance of tangible personal property, or any shape of an existing article of tangible personal property where either party to the transaction furnishes the material, is a fabrication under this regulation. A fabrication is a sale and is subject to the sales tax. **Reupholstered furniture and custom made draperies are examples of a fabrication.** (emphasis added.)

The Audit Bureau contends that because Taxpayers reupholstered furniture, the transactions in issue constitute fabrication which is a sale subject to the sales tax pursuant to 830 CMR 64H.1.1:(3). The Audit Bureau also contends that pursuant to General Laws Chapter 64H, section 1, Taxpayers may not deduct "labor or service cost" from the sales price subject to tax. The Audit Bureau concludes that the entire price charged by Taxpayers with respect to the transactions in issue is subject to tax.

Taxpayers assert that the regulation is incorrect and the sales tax is not applicable to the portion of the sales price relative to labor because reupholstering is a service. Alternatively, Taxpayers assert that the relevant transactions are not subject to tax because either (1) what they do is "refabrication" and not "fabrication" and, thus, what they do is not a "sale" within the meaning of section 1 of chapter 64H, or (2) under the pertinent case law, what they do is a "service."

With respect to the first assertion — that reupholstering is a nontaxable service — Taxpayers point to an amendment made to chapter 64H, section 1 by the Acts of 1990, chapter 121, section 42 as authority for the conclusion that their activities are services not subject to the sales tax in effect for the taxable periods in issue. Specifically, Taxpayers cite to the portion of section 1, as amended, which defines services as "a commodity consisting of activitie engaged in by a person for another person for consideration . . . ; and provided further that the term services shall be limited to the following items: . . . Miscellaneous repair services SIC(76), provided to business;."

Taxpayers further note that the Standard Industrial Classification (SIC) Code 76, referred to in the statute above, includes reupholstering and furniture repair as miscellaneous repair services. Taxpayers conclude that the legislature, in adopting the SIC 76, intended to classify reupholstering as a service.

To begin with, the portion of the statute which Taxpayers cite, as originally enacted, was to apply to periods beginning on or after September 1, 1990. It was subsequently amended to extend the effective date to March 6, 1991 and then, on March 8, 1991, it was repealed. Thus, it was only in effect for two days.

More importantly, however, the provisions which Taxpayers cite were never intended to displace or exempt transactions which the Department had previously concluded were sales of tangible personal property. In the instant matter, transactions which involve the reupholstering of furniture with

materials supplied by the taxpayers have been determined by the Department, by regulation, to be sales of tangible personal property.

Taxpayers, in the alternative, assert that "refabrication" is not a "sale" because the statute refers to "fabrication" not "refabrication" or "reupholstering." Taxpayers assert that "refabrication" is defined differently from "fabrication." Taxpayers point to a dictionary definition of "fabrication" as "a means to construct an item, to manufacture by assembling parts", (see *Random House Dictionary*, second edition). Taxpayers also point out that "RE" is a prefix from the Latin meaning "again", or "again and again" to indicate repetition. (see *Random House Dictionary*, second edition). Taxpayers conclude that the definition of refabrication is different from "fabrication."

Taxpayers have given us a definition of "fabrication" and essentially suggested that "refabrication" means to fabricate again. We find no substantive difference between "fabricating" and "fabricating again". Consequently, we determine that "refabrication", is included in the concept of "fabrication" as that term is used in General Laws Chapter 64H section 1.

Finally, Taxpayers assert that refabrication is a service pursuant to the decision in *Houghton Mifflin Company vs. State Tax Commission*, 373 Mass. 772 at 774 (1977), from which case they quote as follows:

> "Whether a particular transaction involving the transfer of property is a personal service transaction depends on the facts. Both parties argue, and we agree, that where the services and the property are inseparable, because of the integrated nature of the transaction, the character of the transaction must be analyzed to ascertain whether the buyer's basic purpose was to acquire the property which was sold to it, or to obtain the services."

Houghton Mifflin at 772.

Taxpayers assert that the "basic purpose" of the transactions at issue was "the seeking out of a skilled repair service". Taxpayers conclude that the transactions in issue are therefore services.

Based on the facts as described above, we determine that the "real object" of the transactions in issue is to obtain reupholstered furniture. This conclusion is consistent with General Laws Chapter 64H, section 1 and Code of Massachusetts regulations section 830 CMR 64H.1.1:(3). Accordingly, we determine that the transactions in issue are sales of tangible personal property as defined in Chapter 64H, section 1 and that the entire price of the transactions is subject to the sales tax under chapter 64H.

2. *Assessment of Prior Years*

Taxpayers assert that "it is inequitable for the Commissioner to be permitted to go back five (5) years, through its own inaction, to assess a sales tax on the Taxpayer. The Commissioner should be limited to the current year in question and all future years". Letter from Carl Emmett Baylis, Esq., to David O'Coin, Audit Supervisor, November 7, 1990.

General Laws Chapter 62C, section 26(b) states in part that:

> If the commissioner determines, from the verification of a return or otherwise, that the full amount of any tax has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was required to be filed, whichever occurs later, assess the same with interest as provided in section thirty-two to the date when the deficiency assessment is required to be paid, first giving notice of his intention to the person to be assessed.

General Laws Chapter 62C, section 27 states in part that:

> If, before the expiration of the time prescribed under section twenty-six for the assessment of any tax, the commissioner and the taxpayer consent in writing to extend the time for the assessment of the tax, the commissioner or his duly authorized representative may examine the

> books, papers, records, and other data of the taxpayer, may give anynotice required by section twenty-six and may assess the tax at any time prior to the expiration of the extended time. The period so extended by the commissioner and the taxpayer may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

We note that, for purposes of making additional assessments, all periods here at issue have been extended by agreements (Forms AR-37) either within three years of the filing of the sales tax returns at issue or within the time allowed by previously agreed to extensions. Accordingly, we determine that, pursuant to General Laws Chapter 62C, section 26(b) and 27, all the periods in issue are properly open for additional assessments.

This matter will be returned to the Audit Division for assessment consistent with these determinations.

Very truly yours,

COMMISSIONER OF REVENUE

by */s/ Robert B. MacPhail*
Robert B. MacPhail, Chief
Appeal & Review Bureau
Brian E. McNulty, Esq.
Hearing Officer

RBM:BEM:jt
cc: Carl E. Baylis, Esq.
Bernard F. Crowley, Jr.,
Deputy Commissioner, Audit Division
3015

COMMONWEALTH OF MASSACHUSETTS

WORCESTER,SS: SUPERIOR COURT
DEPARTMENT OF THE
TRIAL COURT
C.A.NO. 93-2589-A

.....

WALTER R. LEGER d/b/a
OFFICE CHAIR MAINTENANCE CO.
Plaintiff,

vs. COMPLAINT

MITCHELL ADAMS, as he is:
COMMISSIONER OF REVENUE
Defendant.

.....

Introductory Statement

1. This is a civil action seeking declaratory and injunctive relief against the filing of a notice of tax lien against the personal residence of Plaintiff Walter R. Leger. Plaintiff seeks a declaration that the filing of such a lien before the Plaintiff had been given an opportunity for a judicial hearing on the underlying issue of tax liability violates the Fourteenth Amendment to the United States Constitution and Article X of the Constitution of Massachusetts. Plaintiff contends that (i)

reupholstering, the commercial activity in which he engages, is a service and therefore not subject to sales tax under G.L. c. 64, Sections 1 and 2 which exempt all services other than telecommunications services from sales tax; and (ii) in placing a lien on his property without first providing him with an opportunity for a judicial hearing, the Commonwealth deprived him of his property without due process of law.

2. Plaintiff Walter Leger is an individual who resides at 43 Gardner Street, Fitchburg, Massachusetts. He is a shareholder, officer and director of Office Chair Maintenance, Inc. ("OCM"), a Massachusetts corporation with its principal place of business at 1146 Main Street, Fitchburg, Massachusetts. From 1975 until OCM was incorporated in October of 1987, Leger did business as Office Chair Maintenance Company (the "Company"), a sole proprietorship that was the predecessor in interest to OCM. (Hereinafter, OCM and the Company shall sometimes be referred to collectively as the "Companies").

3. The defendant Mitchell Adams is the Commissioner of Revenue with a usual place of business at 100 Cambridge Street, Boston, Massachusetts. He is sued solely in his official capacity.

Jurisdiction

4. Jurisdiction is conferred on this Court by G.L. c. 214, Section 1. Declaratory relief is authorized by G.L. c. 231A.

Specific Allegations

5. M.G.L. c. 64H, Section 2 imposes an excise upon "sales at retail in the commonwealth, by any vendor, of tangible personal property or of services performed in the commonwealth at the rate of five percent of the gross receipts of the vendor from all such sales of such property or services..." The term "services" is limited to telecommunication services. G.L. c. 64H, Section 1. The definition of "sale" includes "the producing, fabricating, processing, printing or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing or imprinting..." *Id.*

6. The Company was issued a vendor registration number in 1975. OCM used that registration number from the time it was incorporated until October 1, 1990 when it obtained a new number issued in its name.

7. The Company was, and since its incorporation OCM has been, engaged in refabricating or reupholstering worn office chairs owned, typically, by the customers who bring them in for refurbishing. The practice of both in billing customers was to state the cost of materials used in the reupholstering and collect a sales tax on that amount. Neither the Company nor OCM has ever charged or collected sales tax on the cost of the labor involved in the reupholstering.

8. After an examination of the Companies' books, the Audit Bureau of the Massachusetts Department of Revenue (the

"Audit Bureau") determined that the Company and OCM should have charged and collected sales tax on the labor charge. On or about September 14, 1990, the Audit Bureau sent a Notice of Intention to Assess Sales and Use Tax ("NIA") to Walter R. Leger d/b/a Office Chair Maintenance Co. for the taxable periods January 1, 1985 through September 30, 1985, and July 1, 1987 through September 30, 1989, and an NIA to OCM for the taxable periods October 1, 1989 through March 30, 1990. Copies of the NIAs are appended hereto and marked Exhibit "A".

9. The Companies waived their right to an office conference pursuant to G.L. c. 62C, Section 26b, but requested, and were granted, an administrative hearing on the issue of whether reupholstering constitutes the taxable sale of tangible personal property or, rather, as they contended, it is a nontaxable service. The hearing was held at the Audit Bureau on April 19, 1991.

10. Three hundred and seventy-one days later, in a letter to Mr. Leger dated April 24, 1992 ("Letter Ruling"), the Audit Bureau rendered its decision that reupholstering constitutes the taxable sale of tangible personal property. A copy of the Letter Ruling is appended hereto and marked Exhibit "B".

11. On September 1, 1992, the Companies applied in writing to the Commissioner of Revenue for an abatement of the sales taxes on labor the Department of Revenue ("DOR,") was demanding. The Commissioner of Revenue denied their claim for abatement for all periods except for periods ending

March 30, 1985, June 30, 1985 and September 30, 1985. See Exhibit "C".

12. In a letter dated September 2, 1992 (the "Collection Letter"), the DOR notified the Companies that if they failed to pay the outstanding amounts due within ten days, the DOR would institute collection actions to secure payment of the amounts owed. The Collection Letter informed the Companies that "[s]pecifically, these actions can and will include the filing of tax liens against your property, levying your bank accounts and/or wages and seizure of your assets." A copy of the Collection Letter is appended hereto and marked Exhibit "D".

13. On or about November 6, 1992, the DOR filed with the Secretary of State a Notice of Massachusetts Tax Lien in the amount of $85,396.50 upon all property and rights to property belonging to Walter R. Leger. A copy of the Notice is appended hereto and marked Exhibit "E". That Notice was not sent to Mr. Leger or the Companies.

14. Leger first learned of the lien on December 11, 1992 when his application to the Worker's Credit Union of Fitchburg for an equity line of credit was denied because of the existence of the lien. See Exhibit "F".

15. On December 16, 1992, the Companies filed a Petition Under Formal Procedure with the Appellate Tax Board, Docket No. F205105 appealing the Commissioner of Revenue's denial of their claim for abatement.

16. Other than an Answer having been filed by the Commissioner, no further action or proceeding has taken place.

17. On May 10, 1993 a second Petition Under Formal Procedure was filed, Docket No. F207939 for the periods ending March 31, 1985, June 30, 1985 and September 30, 1985 subsequent to the abatement denial by the Commissioner. See Exhibit "G".

18. No Answer has been filed by the Commissioner and no further action or proceeding has taken place.

19. Walter R. Leger is directly and immediately injured by the DOR's filing of the Notice of Lien, because it has placed a cloud on the title to property belonging to him, damaged his credit rating and that of OCM, and impaired their ability to finance the operation of their business.

20. On August 24, 1993, OCM filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of Massachusetts. The Docket Number in that Court is 93-42303.

COUNT I

21. The Audit Bureau contends that reupholstering furniture is a transaction subject to the sales tax because it is the "fabricating . . . of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the . . . fabricating . . . " *See*

G.L. c. 64H, Section 1; Letter Ruling, p.4. Its position is based on the Code of Massachusetts Regulations which defines "fabrication" as follows:

> Any change in the form or substance of tangible personal roperty, or any substantial alteration in the form or shape of an existing article of tangible personal property where either party to the transaction furnishes the material, is a fabrication under this regulation. A fabrication is a sale and is subject to the sales tax. Reupholstered furniture and custom made draperies are examples of a fabrication.

830 CMR 64H.1.1:(3); See Letter Ruling, p.4.

22. The regulation is not authorized by law and the sales tax is not applicable to that portion of the sales charge which covers labor because reupholstering is a service and the only services subject to sales tax under G.L. c. 64H, Sections 1 and 2 are telecommunications services. *See* Letter Ruling, pp. 4-5.

23. The General Court passed Chapter 121 of the Acts of 1990, formally known as "An Act Establishing the Economic Stability and Recovery Compact." The purpose of that Act was to impose a sales tax on services. The General Court defined services to include " . . . miscellaneous repair services. . . " as set forth in the U.S. Standard Industrial Classasification Manual. That Manual defined miscellaneous repair service to include reupholstering and furniture repair. This statutory definition of miscellaneous repair service to

include reupholstering and furniture repair was agreed to by the Commissioner of Revenue in the Emergency Regulations dated March 5, 1991 and effective March 6, 1991, see 830 CMR 64H.1.6 (15)(e) at page 18. See Exhibit "H" attached hereto which contains the relevant pages of the Regulation — i.e., pages 1-9 and pages 16-18 — in particular, page 16 of Exhibit "H".

24. The General Court ultimately decided not to tax services and repealed the sales tax on services retroactive to March 6, 1991. *See* St. 1991, c.4.

COUNT II

25. In pressing their claim that reupholstering is not subject to sales tax and thus that they do not owe the taxes, the Companies are in the process of pursuing their statutory administrative remedies. Accordingly, they have not been entitled to seek judicial review.

26. In recording a tax lien to secure the payment of the disputed sales taxes before affording the Plaintiff and OCM the opportunity for a judicial hearing, the Commonwealth has acted in violation of the due process clauses of the constitutions of both the United States and the Commonwealth. U.S. Const. Amend. XIV; Mass, [sic] Const. art. X.

Prayers for Relief

Wherefore, the Plaintiffs pray that this Honorable Court:

1. Enter a declaration that the reupholstering done by Plaintiff is a service and not subject to sales tax under G.L. c. 64, Sections 1 and 2.

2. Enter a declaration that Defendant's filing of a tax lien against the property of Walter R. Leger before he had been given an opportunity for a judicial hearing on the underlying issue of tax liability violates the Fourteenth Amendment of the United States Constitution and Article X of the Constitution of the Commonwealth of Massachusetts.

3. Issue a permanent injunction enjoining the Commissioner, his agents, employees, attorneys and all other persons or agencies in active concert and participation with him from in any manner seeking to enforce the tax lien filed against the property of Walter R. Leger or from taking any other summary action of a similar nature against him to secure the amounts that the Commissioner claims Plaintiff and the Companies owe, until he has been given a judicial hearing on the underlying issue of tax liability; and

4. Provide such further relief as justice and equity require.

WALTER R. LEGER d/b/a OFFICE CHAIR MAINTENANCE CO.
By his attorneys,

/s/ Carl Emmett Baylis
Carl Emmett Baylis, Esq.
BBO No. 033900
27-29 Mechanic Street
Worcester, MA 01608
(508) 792-1972

/s/ Stephen S. Ostrach
Stephen S. Ostrach, Esq.
BBO No. 380675
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111

Dated: October 28, 1993

THE COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
C.A. 93-2589-A

WALTER R. LEGER d/b/a OFFICE
CHAIR MAINTENANCE CO.,
Plaintiff,

vs.

MITCHELL ADAMS, COMMISSIONER
OF REVENUE,
Defendant.

AFFIDAVIT

I, Robert B. MacPhail, hereby depose and say:

1. I am the Chief of the Appeal & Review Bureau of the Department of Revenue, a position I have held since January 1987. I have personal knowledge of the facts set forth herein.

2. The Appeal & Review Bureau ("A&R"), which is part

of the Department's Legal Division, conducts administrative hearings to determine whether proposed state tax assessments are proper or whether assessed taxes should be abated. The procedures governing pre-assessment cases and abatement cases are virtually identical. This affidavit deals with the process only as it relates to pre-assessment cases. Paragraphs 3 - 11 below describe the procedure presently in effect; Paragraphs 12 - [sic] describe the procedure in effect as of the plaintiff's administrative proceedings.

Referral for Hearing — Present Procedure

3. If pursuant to an audit, or otherwise, the Audit Division (or other initiating bureau) of the Department of Revenue believes that a taxpayer has under-reported its tax, normally it will issue a Notice of Intention to Assess ("NIA") a deficiency. Prior to the assessment of the deficiency, the Audit Division notifies the taxpayer that it has the statutory right to confer with the Commissioner as to the proposed assessment; that hearing, ordinarily conducted by A&R, must be requested within 30 days after the date of the NIA. G.L. c. 62C, §26(b).

4. To initiate a pre-assessment hearing, the taxpayer is requested to complete a hearing request form (Form AR-2) stating the taxpayer's claim that the proposed assessment is in error. The taxpayer is encouraged (but not required) to cite any relevant statutes, cases, and other authorities in support of its position, and may attach additional documentation.

5. The Form AR-2 and any additional documentation is returned to the Audit Division, which will transfer that information, together with the audit case file, to A&R.

The Hearing at A&R — Present Procedure

6. At A&R, the pre-assessment case is reviewed by managerial staff and assigned to a hearing officer who, after studying the matter, will schedule the case for a hearing.

7. The proceedings at the hearing are informal. It is not a hearing under Massachusetts General Laws chapter 30A. Generally, the hearing officer and the taxpayer and/or the taxpayer's authorized representative attend the hearing. A representative of the Audit Division may also attend the hearing where A&R, in a particular case, determines such attendance is warranted.

8. Usually the hearing officer summarizes the issues in the matter, asks the taxpayer to present its case, and may ask questions. At the hearing, the taxpayer may present legal arguments in writing or orally, and may present evidence either orally or with documents. He may bring witnesses with him and may ask questions of Department officials who are present. Further documentation may be submitted after the hearing. Similarly, the hearing officer may request additional information.

9. The hearing officer does not make a determination at the hearing. Rather, the matter is taken under advisement. A determination letter is drafted for review and approval by the

Chief of A&R. A final determination letter is prepared for signature by the Chief of A&R. Thereafter, the letter issues to the taxpayer; a copy is sent to the Audit Division and if a proper power of attorney has been submitted, a copy is sent to the taxpayer's representative. If the determination is adverse to the taxpayer, generally the letter includes a standard paragraph which outlines the taxpayer's further appeal rights.

10. Finally, the case file is returned to the Audit Division for disposition consistent with A&R's determination.

11. No assessment is made until after a requested hearing is held and a determination is made. G.L. c. 62C, §26(b).

Prior Procedure

12. The procedure described in Paragraphs 3 - 11 above has been in effect since July 1, 1993. Prior to that time and as of the time of the plaintiff's administrative proceedings, the pre-assessment procedures set forth in the Department's published Administrative Procedures 609 and 628, as then in effect, applied. I attach copies of said Administrative Procedures as Exhibits A and B, respectively.

13. The primary difference between the present and prior procedures is that previously the taxpayer had an "office conference" before the bureau initiating the assessment and then could request a discretionary hearing before A&R, while now the taxpayer in all instances receives a pre-assessment hearing before A&R. The procedures that applied in both the

office conference and any discretionary A&R hearing were the same as those set forth in Paragraph 8 above. No assessment would be made until after any office conference decision and, if the taxpayer requested an A&R hearing, A&R either declined to hold a hearing or issued a letter of determination after a hearing.

14. I attach copies of the Department's published Administrative Procedures 611 and 631 as Exhibits C and D, respectively.

Signed under the pains and penalties of perjury this

16th day of *March* , 1994.

/s/ Robert B. MacPhail
Robert B. MacPhail
Chief, Appeal & Review Bureau

WORCESTER, SS. SUPERIOR COURT
C.A. 93-2589-A

WALTER R. LEGER d/b/a OFFICE CHAIR MAINTENANCE CO. V. COMMISSIONER OF REVENUE

AFFIDAVIT

I, Bernard F. Crowley, hereby depose and say that:

1. I am the Deputy Commissioner of the Audit Division of the Massachusetts Department of Revenue.

2. I have held this position since *September , 1988.*

3. Part of my responsibilities is oversight of the audit and assessment functions of the Department of Revenue.

4. Annually, the Department of Revenue makes *[symbol for "more than"] 70,000* audit assessments.

Signed under the pains and penalties of perjury this *10th* day of March 1994.

/s/ Bernard F. Crowley, Jr.
Bernard F. Crowley, Jr
Deputy Commissioner